ABD RAHIM ABD RAHMAN & ORS

v.

DMD INDUSTRIES SDN BHD & ORS; KAMARIYAH HAMDAN & ORS (THIRD PARTIES)

HIGH COURT MALAYA, MUAR
UMI KALTHUM ABD MAJID JC
[CIVIL SUIT NO: 22-29-2000]
2 JULY 2010

CIVIL PROCEDURE: *Execution - Stay - Application for an order for stay of execution of a High Court judgment pending disposal of appeal to Court of Appeal - Whether order for stay of execution merited - Special circumstances - Rules of the High Court 1980, O. 55 r. 12*

CIVIL PROCEDURE: *Judgments and orders - Stay of execution - Application for an order for stay of execution of a High Court judgment pending disposal of appeal to Court of Appeal - Whether order for stay of execution merited - Special circumstances - Rules of the High Court 1980, O. 55 r. 12*

This was an application by the second defendant under O. 55 r. 12 Rules of the High Court 1980 for an order for a stay of execution of a judgment given by this court against it, pending the disposal of its appeal to the Court of Appeal. The plaintiffs, the owners of three pieces of land ('said lands'), had entered into an agreement with the first defendant for the development of the said lands into a housing estate. Subsequently, the first defendant executed a facilities agreement with the second defendant and charged the said lands ('said charges') to the second defendant as security for the facilities agreement. The plaintiffs then filed a successful action against the second defendant for the cancellation of the said charges and for the return of the said lands. The second respondent raised five special circumstances to merit its application for an order of stay: (i) in the event the said charges were discharged, the second defendant would incur costs in re-registering the said charges if it succeeded in its appeal; (ii) in the event the said lands were disposed of to third parties, the substratum of the appeal would be lost; (iii) in the event the said lands were disposed of and the second defendant succeeded in the appeal, the second defendant would suffer a loss which could not be compensated; (iv) its appeal had merits and a good chance of success; and (v) the plaintiffs were Singaporeans and were ordinarily resident in Singapore.

Held (dismissing the application with costs):

(1) The costs of re-registering the said charges would not be substantial and those costs in any event may be recovered during the taxation of costs process. (para 9)

(2) As the plaintiffs' claim against the second defendant primarily concerned the validity of the said charges, the second defendant, if it should succeed in its appeal, could still enforce the said charges against the plaintiffs and the said lands. To this end, the cancellation of the said charges and the return of the issue documents of title to the plaintiffs would not render the substratum of the second defendant's appeal lost. If the second defendant really believed that this was the effect, it would not have raised the issue of needing to re-register the said charges. As for the second defendant's fears that the plaintiffs may dispose of the said lands to third parties, the second defendant had not provided proof that this event was likely to occur. (para 10)

(3) In the event the said charges were declared valid on appeal, the second defendant may claim the value of the said lands against the plaintiffs personally, and should that value fall short of the loan amount given to the first defendant it may also claim the balance of the monies owed by the first defendant from the plaintiffs. Thus, it could not be said that the second defendant would have suffered a loss which could not be compensated in these circumstances. Furthermore, the second defendant had not alleged that the plaintiffs were not financially sound enough to repay the value of the said lands (in the event of any disposal) to the second defendant. (paras 11 & 12)

(4) The merits of the second defendant's appeal were not a relevant matter of consideration in this application for stay. *Kosma Palm Oil Sdn Bhd & Ors v. Koperasi Makmur* (foll); *Ming Aun Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* (foll). (para 14)

(5) The fact that the plaintiffs were Singaporeans and were residing in Singapore did not constitute a special circumstance as they had proven that they had substantial assets within the jurisdiction of this court. Further, Singapore is a country listed in the First Schedule to the Reciprocal Enforcement of

Judgments Act 1958. This should reassure the second defendant that there is legal recourse against the plaintiffs should it succeed in its appeal. (para 15)

(6) For the reasons stated above, there were no special circumstances that merited this application being allowed. (para 16)

Case(s) referred to:

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(foll)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 38 CA ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 73

Rules of the High Court 1980, O. 55 r. 12

For the plaintiff - Raymond Mah; M/s Mah Weng Kwai & Assoc

For the defendants - Maziah Md Yamin; M/s Chee Siah Le Kee & Partners

Reported by Suresh Nathan

JUDGMENT

Umi Kalthum Abd Majid JC:

The Application

[1] The second defendant applied in encl. 266 under O. 55 r. 12 of the Rules of the High Court ("RHC") for an order for a stay of execution of the judgment dated 17 November 2009 given by this court against the second defendant ("the judgment") pending the disposal of the second defendant's appeal to the Court of Appeal.

Facts

[2] The plaintiffs are the registered owners of three pieces of land ("the said lands") all situated in the District of Muar, Johor. The plaintiffs entered into a joint venture agreement dated 13 January 1994 with the first defendant ("JV Agreement"). By this JV Agreement, the plaintiffs had agreed and had given permission to the first defendant to develop the said lands into a housing estate. The plaintiffs were also required, and did so executed, an irrevocable

A Power of Attorney dated 12 January 1994 in favour of the first defendant in respect of the said lands ("the Power of Attorney"). The purpose at intention of the Power of Attorney was to allow the first defendant to do all things necessary to obtain the necessary approvals and generally for development of the said lands into a B housing estate. The purpose of a loan or finance obtained by the first defendant in respect of the said lands was also expressly limited for the purpose of developing the housing estate.

[3] After vacant possession of the said lands was delivered to the C first defendant, the first defendant commenced the clearing and filling works on the said lands but did not take further steps to develop the said lands into a housing estate.

[4] Unbeknown to the plaintiffs, the first defendant negotiated and executed a Facilities Agreement dated 9 January 1997 with the D second defendant ("the Facilities Agreement"). As security for the Facilities Agreement, the first defendant charged the said lands to the second defendant ("the said charges"). The plaintiffs did not benefit in any way from the credit facilities given by the second defendant to the first defendant. E

[5] The plaintiffs then filed this civil action against the second defendant for the cancellation of the said charges and for the return of the said lands.

F **[6]** On 17 November 2009, YA Dato' Ahmadi bin Haji Asnawi allowed the plaintiffs' claim against the second defendant and ordered:

6.1. a declaration that the said charges in favour of the second defendant in respect of the said lands are invalid G and without effect;

6.2. the second defendant to redeliver the duplicates of the said charges to the Land Administrator at the Land Office to cancel the said charges over the said lands H within 14 days upon the service of the judgment;

6.3. the Muar Land Office to cancel the said charges. The issue documents of title now kept by the second defendant be sent to the Land Office for cancellation of the said I charges and thereafter, the relevant documents of title be returned by the second defendant to the plaintiffs within 14 days upon the service of the judgment.

6.4. if the second defendant fails to execute Form 16N to discharge the charges within 14 days from the date of service of the judgment, then the Senior Assistant Registrar of the Muar High Court shall execute Form 16N for the said charges and register them at the Land Office for the discharge of the said charges;

6.5. the second defendant be restrained from proceeding with the application or action for public auction in respect of the said lands; and

6.6. costs to be taxed.

Special Circumstances

[7] The general rule is that an appeal shall not operate as a stay of execution unless the court 20 orders – see s. 73 of the Courts of Judicature Act 1964, *Kosma Palm Oil Mill Sdn. Bhd. & Ors v. Koperasi Serbausaha Makmur Bhd.* [2003] 4 CLJ 1, FC. This general rule is premised on the principle that the court will not deprive a successful party of the fruits of his litigation. In order for me to consider this stay application, the second defendant is required to prove by affidavit evidence that there are special circumstances which warrant a stay order. What constitutes "special circumstances" would depend on the facts of the case.

[8] The second defendant raised five special circumstances to merit the stay order. They are:

8.1. in the event the said charges are discharged, the second defendant would be put to cost and expense in re-registering the said charges if it succeeds in the appeal;

8.2. in the event the said lands are disposed of to third parties, the substratum of the appeal would be lost;

8.3. in the event the said lands are disposed of and the second defendant succeeds in the appeal, the second defendant would suffer a loss which cannot be compensated;

8.4. there is merit and a good chance of success in the appeal;

8.5. the plaintiffs are Singaporeans and are ordinarily resident in Singapore.

A **Cost Of Re-registering The Said Charges**

[9] I do not find this reason as a special circumstance. I agree with learned counsel for the plaintiffs when he submitted that the costs of re-registering the said charges would not be substantial and
B that these costs in any event may be recovered during the taxation of costs process.

The Substratum Of The Appeal

[10] As the claim by the plaintiffs against the second defendant
C primarily concerns the validity of the said charges, should the second defendant succeed in its appeal it can still enforce the said charges against the plaintiffs and the said lands. To this end I disagree with the submission of the second defendant that with the cancellation of the said charges and the return of the issue
D documents of title to the plaintiffs would render the substratum of the second defendant's appeal being lost and the appeal being academic. If the second defendant really believes that this is the effect, it would not have raised the issue of needing to re-register the said charges. There is therefore no merit in the second
E defendant's argument on this aspect. As for the second defendant's fears that the plaintiffs may dispose of the said lands to third parties, I find that the second defendant has not provided proof of this event likely to take place.

F **Loss Which Cannot Be Compensated**

[11] I agree with the submission of learned counsel for the plaintiffs when he submitted that the second defendant is a financial institution and is only interested in recovering the monies loaned to
G the first defendant. The second defendant's interest in the said lands is wholly commercial and pecuniary and it does not have any real interest in the said lands to be capable of suffering from a loss "which cannot be compensated". In the event the said charges are declared valid on appeal, the second defendant may claim against
H the plaintiffs personally the value of the said lands and should the value of the said lands fall short of the amount of loan given to the first defendant, the second defendant may also claim the balance of the monies owed by the first defendant from the plaintiffs. Thus it cannot be said that the second defendant would have suffered a loss
I which cannot be compensated in these circumstances.

[12] Further, the second defendant has not alleged in its affidavits that the plaintiffs are financially unsound to repay the second defendant the value of the said lands in the event of any disposal. It is insufficient to say that the plaintiff are individuals – see *Kosma Palm Oil (supra)*, with the implication that they would not be in the position to compensate the second defendant should the appeal be in the second defendant's favour. Learned counsel for the plaintiffs, moreover, had referred to the fact that the plaintiffs have other assets in Malaysia. These assets had been deposed in the plaintiffs' affidavit in reply affirmed by Wong Sang Eng on 19 June 2001 in encl. 37.

[13] I therefore find that the second defendant has failed to prove a special circumstance under this heading.

Good Chance Of Success In The Appeal

[14] Based on the authority of *Kosma Palm Oil (supra)* and *Ming Ann Holdings Sdn. Bhd. v. Danaharta Urus Sdn. Bhd.* [2002] 3 CLJ 380, suffice for me to say that the merits of the second defendant's appeal are not a relevant matter for consideration by me in this stay application. I, however, would like to mention here that even though the second defendant has made many averments in its affidavits that it has good chances of succeeding in its appeal, which then compelled the plaintiffs to reply and the learned counsel for the plaintiffs to submit at length on the lack of merits in the second defendant's appeal, yet the second defendant's learned counsel in her submission stated that whether or not there are merits in the appeal as submitted by the plaintiffs learned counsel are not relevant.

The Plaintiffs Are Singaporeans

[15] I agree with learned counsel for the plaintiffs when he submitted that the fact that the plaintiffs are Singaporeans and are residing in Singapore does not constitute special circumstance. This is in view of the fact that the plaintiffs had proven to the court's satisfaction in the second defendant's application for security for costs against the plaintiffs, that they have substantial assets within jurisdiction of this court. Further, Singapore is a country listed in the First Schedule to the Reciprocal Enforcement of Judgments Act 1958. These facts should reassure the second defendant that should it succeed in its appeal, there is legal recourse against the plaintiffs nevertheless.

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Conclusion

[16] For the reasons stated above, I find that there are no special circumstances meriting this application be allowed. I therefore dismiss this application with costs at RM5,000. The plaintiffs must
B be allowed to enjoy the fruits of their litigation, especially after a full trial had been conducted.

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